No. 89-846

In the Supreme Court of the United States

OCTOBER TERM, 1989

GUILLERMO SUAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated Fed. R. Crim. P. 30 when, after hearing closing arguments, it supplemented a proposed jury instruction that it had provided to the parties during the charge conference.

2. Whether the district court abused its discretion when it denied petitioner's counsel's request for additional time to prepare for closing argument.

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OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1989. The petition for a writ of certiorari was filed on October 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Middle District of Florida, petitioner was convicted on two counts of willfully at-

tempting to evade taxes, in violation of 26 U.S.C. 7201. He was sentenced to six months' imprisonment, five years' probation, a $50,000 fine, and community service. Pet. App. 2-3. The court of appeals affirmed the conviction without opinion.

1. During 1982 and 1983, petitioner was a physician with a family practice in St. Petersburg, Florida.[1] He operated as a professional corporation. On the joint returns that he filed with his wife for those years, petitioner failed to report as income: (i) a number of $2500 monthly bonuses that he received from the corporation; (ii) cash that he diverted from office receipts; and (iii) payments from corporate funds for personal expenses. On his income tax returns, petitioner reported adjusted gross income of $39,222 for 1982 and $60,000 for 1983. As calculated by the government, petitioner's gross income was actually $89,361.45 for 1982 and $92,420.05 for 1983. Petitioner's tax deficiencies amounted to $11,746.26 for 1982 and $8,205.91 for 1983. Gov't C.A. Br. 3-8.

The theory of the defense was that there had been no tax deficiency and that any shortfall in petitioner's reported income was not willful. Petitioner did not testify. With respect to the monthly bonuses, one of petitioner's accountants testified that he considered the payments to be repayments of loans that the corporation had received from petitioner. However, the accountant conceded that he had never seen the interest rate on the purported loans and had no information regarding their maturity date. The loans were not reflected on petitioner's financial statements. Office employees testified that the accountant and petitioner had referred to the payments as bonuses,

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[1] The indictment charged petitioner with attempting to evade taxes for the 1981, 1982, and 1983 tax years. Petitioner was acquitted with respect to 1981. See Pet. App. 1.

and the payments were recorded as "bonus" in check registers. Finally, in connection with a mortgage loan, petitioner advised a bank representative that he received a bonus of $2500 per month, and another of petitioner's accountants confirmed the existence of the bonuses in a letter to the bank. That accountant testified that petitioner had never told him that the payments were loan repayments. Gov't C.A. Br. 4-5.

3. Petitioner's case was completed during the afternoon of July 21, 1988, a Thursday. The government announced that it would present no rebuttal. After a brief colloquy, the court decided to allow each party an hour and a half for closing argument. Petitioner's counsel then asked the court to postpone the arguments until Saturday morning. The trial court denied that request, explaining that it wished to complete arguments that day so that the jury could deliberate on Friday and perhaps avoid a Saturday session. 13 Tr. 123-124.

After a brief recess, the court began the charge conference. The court gave counsel for both parties its proposed jury instructions and began to go through them one by one, inviting counsel to raise questions and make comments or objections concerning individual instructions. 13 Tr. 125-141. Petitioner's counsel objected to that procedure, saying that he had not had an opportunity to review the court's proposed instructions or compare them to his requested instructions. *Id.* at 125, 130. The district court responded by allowing petitioner's counsel time to consider each instruction. For instance, in answer to petitioner's counsel's complaint that he had not been able to compare one proposed instruction to an instruction requested by the defense, the court stated, "Well, read it, compare it and tell me if you have any objection to it." *Id.* at 132. See *id.* at 137-138 (granting counsel's response for a "chance to read [an instruction] a little more thoroughly").

Before all of the proposed instructions had been reviewed, the court announced that it was going to bring in the jury for closing arguments. Petitioner's counsel did not object to going forward with closing arguments before the charge conference was completed and did not argue that Fed. R. Crim. P. 30 prohibited that procedure. 13 Tr. 141. Consequently, counsel delivered their closing arguments on Thursday afternoon (*id.* at 141-226), and the court completed the charge conference the following morning (14 Tr. 2-40).

During the portion of the charge conference that preceded closing arguments, the government asked the court to supplement an instruction (requested by the defense) that the court had included in its proposed instructions. In the form in which the court provided it to the parties at the beginning of the charge conference, the instruction provided that amounts received as loans or repayments of loans are not taxable income; the prosecutor argued that the instruction should also make clear that simply calling a transaction a loan does not make it a loan unless the borrower has a good faith intent to repay funds that have been advanced. 13 Tr. 138-139. The court denied the government's request, but told the prosecutor that "if you want to argue that simply designating a loan a loan does not make it a loan unless it really is a loan, you're at liberty to argue that." *Id.* at 139. After closing arguments, the government renewed its request for language making it clear that there must be an intent to repay a loan. 14 Tr. 10-16. While petitioner's counsel argued against the addition of that language, he did not maintain that Fed. R. Crim. P. 30 foreclosed amending the instruction or that his closing argument had been affected by the omission of the supplemental language from the court's proposed instruction. 14 Tr. 10-16. The district court amended the loan instruction in the manner suggested by

the government, observing that the amendment was "accurate," "sensible," "in conformity with the issues presented to the jury," and not prejudicial to petitioner. 14 Tr. 14.

ARGUMENT

1. Petitioner contends that the district court violated Fed. R. Crim. P. 30 by interrupting the charge conference to hear closing arguments and later amending the jury instruction on the tax treatment of loans. Pet. 10-16.

When the district court interrupted the charge conference, petitioner's counsel did not suggest that Rule 30 prohibited that course. Similarly, although counsel objected to the substance of the amendment proposed by the prosecutor to the loan instruction, he did not contend that Rule 30 prohibited the court from adopting it. Consequently, petitioner's claim that the district court violated Rule 30 is foreclosed in the absence of plain error. Fed. R. Crim. P. 52(b). This Court has repeatedly emphasized that "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985), quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). No such showing can be made on the record of this case.

The procedure followed by the court in this case was in compliance with Rule 30.[2] By its terms, that rule requires

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[2] Rule 30 provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * The court shall inform counsel of its proposed ac-

the trial court to "inform counsel of its *proposed* action upon the [parties' written] requests [for instructions] prior to their arguments to the jury" (emphasis added). In this case, the district court provided counsel with copies of its proposed instructions—which reflected the court's action on both parties' requests—before closing arguments. Although courts often hear objections to their proposed instructions and consider modifications during a charge conference conducted before oral arguments begin, Rule 30 does not mandate that procedure.[3] There was no error, let alone plain error, in the procedure that the district court followed here.

Similarly, Rule 30 did not prohibit the court from adding the sentence proposed by the government to the loan instruction after closing arguments had been completed.[4]

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tion upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

[3] Cf. *United States* v. *Williams*, 447 F.2d 894, 901 (5th Cir. 1971) (in a case in which the district court stated that it found nothing in the parties' requested instructions that it would "state flatly" that it would not charge, but that it would instruct the jury in its own language, there was no prejudicial violation of Rule 30).

[4] Petitioner was the party that requested the loan instruction. See 14 Tr. 10. The government requested only that the instruction be modified through the insertion of a sentence clarifying its application to sham loans. 13 Tr. 139; 14 Tr. 10-16. The instruction was discussed before closing arguments. 13 Tr. 139. Thus, petitioner was aware before closing arguments that the court had granted his request for a loan instruction. The only point that remained in question, and which was subsequently resolved in favor of the government, was whether the instruction would include the clarifying language requested by the prosecutor.

The purpose of the rule is "to fairly inform the trial lawyers [of the instructions] so that they may intelligently argue to the jury." *United States* v. *Fusaro,* 708 F.2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983).[5] In keeping with this purpose, the courts have recognized that Rule 30 permits a trial court to modify or supplement a proposed instruction after closing arguments in order to prevent the jury from becoming confused and deciding the case on the basis of a mistaken understanding of the law. *United States* v. *Bowman,* 798 F.2d 333 (8th Cir. 1986); *United States* v. *Buishas,* 791 F.2d 1310, 1316-1317 (7th Cir. 1986); *United States* v. *Smith,* 789 F.2d 196, 202-203 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); *United States* v. *Newson,* 531 F.2d 979, 982-983 (10th Cir. 1976); *United States* v. *Shirley,* 435 F.2d 1076, 1078 (7th Cir. 1970).[6] *Bowman* and *Smith,* the cases on which petitioner principally relies (Pet. 11), are among the cases that have applied Rule 30 in this manner.[7]

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[5] Accord *United States* v. *Bowman,* 798 F.2d 333 (8th Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *Wright* v. *United States,* 339 F.2d 578, 580 (9th Cir. 1964); *United States* v. *Shirley,* 435 F.2d 1076, 1078 (7th Cir. 1970).

[6] The courts have also agreed that the rule does not guarantee advance knowledge of all instructions, but requires only that the trial court inform counsel of its rulings on instructions requested by the parties. *United States* v. *Buishas,* 791 F.2d at 1316; *United States* v. *Newson,* 531 F.2d at 982-983; *United States* v. *Clarke,* 468 F.2d 890, 892 (5th Cir. 1972).

[7] In *Smith,* the Third Circuit upheld a supplemental jury instruction delivered a day after the court had charged the jury, noting that the supplemental instruction "did not state a new theory" and that defense counsel was on notice of the issue the instruction addressed. 789 F.2d at 203. In *Bowman,* the trial court modified a defendant's requested instruction on credibility but delivered the "gist" of the instruction; the Eighth Circuit held that the trial court's action "complied with both the letter and the purpose of Rule 30." 798 F.2d at 336. In *United*

Under the standards applied in these cases, the district court acted within its discretion when it clarified its proposed loan instruction after closing arguments. The post-argument addition to that instruction only made clear that sham loans—*i.e.*, transactions in which a borrower has no good-faith intent to repay funds that it has received—are includable in a taxpayer's gross income.[8] As the district

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States v. *Cardall*, 550 F.2d 604, 607 (10th Cir. 1976), cert. denied, 434 U.S. 841 (1977), the only other case addressing Rule 30 that is cited in the petition, the trial court apparently overlooked ruling on certain requested instructions; the Tenth Circuit held that in the absence of any objection or any indication of resulting prejudice, the violation of Rule 30 did not constitute grounds for reversal of the conviction. The reasoning of *Smith*, *Bowman*, and *Cardall* are entirely consistent with the decision of the court of appeals in this case.

This case bears no resemblance to cases in which convictions have been reversed on the basis of violations of Rule 30. See *Wright* v. *United States*, 339 F.2d 578, 579-580 (9th Cir. 1964) (court refused to give defense counsel any indication of whether instructions requested by the defense would be given; as a result, "counsel's closing argument was based upon a theory of defense which the court rejected, or at least ignored, in its subsequent instructions"); *United States* v. *Mendoza*, 473 F.2d 697, 700-701 & n.2 (5th Cir. 1973) (trial court refused to provide specific rulings on instructions requested by the defense before closing arguments and then denied many of those requests after arguments had been heard).

[8] The court instructed the jury as follows (14 Tr. 51) (emphasis added to material added after closing arguments at the request of the government):

> Now, a loan, which the parties to the loan agree is to be repaid, does not constitute gross income as that term is defined by the Internal Revenue Code. If you find that a distribution received by the defendant or any part thereof was either a loan from the corporation which was to be repaid or the repayment of a loan which had been made by defendant to the corporation, then to the extent that the distribution was a loan or a repayment thereof, it would not be income and taxable to the defendant. A loan which the parties to the loan agree is to be repaid does not constitute

court noted, that clarification was undoubtedly a correct statement of the law, and it served to assure that the jury would not misunderstand or misapply the remainder of the instruction. *United States* v. *Pomponio*, 563 F.2d 659, 662-663 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States* v. *Swallow*, 511 F.2d 514, 519, 522-523 & n.7 (10th Cir.), cert. denied, 423 U.S. 845 (1975); *United States* v. *Rosenthal*, 470 F.2d 837, 841-842 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973); *United States* v. *Rochelle*, 384 F.2d 748, 751-752 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968). Significantly, the new language did not change the substance of the proposed instruction that the court had made available to the parties. In its initial form, the instruction stated twice that a loan "which the parties to the loan agree is to be repaid" is not includable in gross income; the sentence added after closing arguments only made it explicit that a good faith intent to repay is an element of such an agreement. A modification of this kind, which leaves the substance of an instruction unchanged, does not violate Rule 30. See *United States* v. *Shirley*, 435 F.2d at 1078 (approving post-argument modification to requested instruction that "simply removed a potential source of confusion concerning the elements of the crime charged which might have marred the jury's deliberation").

The court's clarification of the loan instruction also did not deprive petitioner's counsel of any opportunity to argue petitioner's loan defense. Before beginning his argument, petitioner's counsel was aware that the jury would

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gross income as that term is defined by the Internal Revenue Code. *However, merely denominating a transaction as a loan is not sufficient to make it such, and where there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.*

be instructed that loans are not includable in gross income. He was thus free to call the jury's attention to any evidence that might support an acquittal on that basis and to alert the jury to that forthcoming instruction. Since sham loans are indisputably taxable, counsel could not have argued for an acquittal on a theory inconsistent with the subsequent clarification in any event. Thus, this is not a case in which counsel could have been misled into arguing a theory of the defense that the court subsequently foreclosed in its jury instructions. Compare *Wright* v. *United States,* 339 F.2d 578, 580 (9th Cir. 1964). The clarification of the loan instruction simply did not curtail or undercut any permissible jury argument that was available to petitioner.

There is no merit to petitioner's claim that his attorney would have "addressed more thoroughly the intent-to-repay aspect of the facts" had he known of the forthcoming modification. Pet. 12. Petitioner has not identified any evidence on that question that he could have, but did not, call to the jury's attention. There was none. There were no contemporaneous documents or other evidences of indebtedness that bore on whether petitioner had advanced funds to the corporation with the expectation that they would be repaid. The fact that the parties' closing arguments focused on whether the loans existed at all and whether petitioner had treated the bonuses as loan repayments during the period he was receiving them was a consequence of the evidence in the case, not the court's handling of proposed instructions. Finally, although it declined initially to add the language requested by the government, the court advised both parties that the prosecutor would be permitted "to argue that simply designating a loan a loan does not make it a loan unless it really is a loan." 14 Tr. 139. As petitioner's counsel well knew, he

was also free to devote as much attention to that issue as he wished.

In short, there was no violation of Rule 30 in this case, much less a violation resulting in "a miscarriage of justice." *United States* v. *Young*, 470 U.S. at 15. Furthermore, even if there had been a violation and petitioner had timely raised the issue, petitioner could not establish that he suffered any actual prejudice—a necessary predicate for relief based on a violation of Rule 30. *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974).

2. Petitioner also contends (Pet. 16-21) that the district court's refusal to postpone closing arguments was an abuse of discretion.

A trial judge has broad discretion with respect to requests for continuances and recesses in the course of trial proceedings. *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983); *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *Carter* v. *United States*, 373 F.2d 911, 914 (9th Cir. 1967); *Johnson* v. *United States*, 291 F.2d 150, 153 (8th Cir.), cert. denied, 368 U.S. 880 (1961). The exercise of this discretion will be disturbed on appeal only in the event of "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.' " *Morris* v. *Slappy*, 461 U.S. at 11-12, quoting *Ungar* v. *Sarafite*, 376 U.S. at 589.

The facts of this case do not disclose an abuse of the court's discretion to schedule its proceedings. The only asserted basis for the request for a recess was petitioner's counsel's claim that he had not "had a chance to really go through" the evidence he had introduced through defense witnesses that day and the day before. 13 Tr. 124. However, the district court was entitled to discount the suggestion that an experienced attorney was unfamiliar with evidence he himself had presented only a short time before. Moreover, having observed petitioner's counsel

throughout the trial, the court noted that he was "sufficiently familiar with the details of this case to be able to do as good a job today as you would do tomorrow or Saturday." *Ibid.* In fact, counsel's closing argument did include a detailed recitation of evidence presented by numerous witnesses. 13 Tr. 175-212. Significantly, petitioner's court of appeals brief and the petition have identified no shortcoming in counsel's closing argument that could be attributed to the court's refusal to grant the request for a recess. This record provides no support for a conclusion that the trial court abused its discretion or that petitioner was prejudiced by the district court's decision.[9]

The denial of a recess did not interfere with petitioner's Sixth Amendment right to the assistance of counsel. See Pet. 19-21. Petitioner was not prohibited from conferring with his counsel concerning his closing argument or any other matter at any point during the trial. Moreover, when

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[9] Contrary to petitioner's contention (Pet. 18-19), there is no conflict between the decision in this case and *United States* v. *McLain*, 823 F.2d 1457, 1460 (11th Cir. 1987). In *McLain*, in an effort to speed up the trial, the judge informed the attorneys that they were being clocked by the courtroom deputy, and the judge periodically announced how much court time had elapsed and how much time each attorney had used. *Ibid.* When the court became dissatisfied with the pace of the trial, she carried out a threat to begin court sessions at 7:30 each morning. *Ibid.* As a result of this "excruciating trial schedule," jurors became restless and inattentive. In an effort to ensure their attentiveness, the judge allowed jurors to eat and drink while seated in the jury box, and to stand while attorneys were conducting their examinations. *Id.* at 1460-1461. These measures proved ineffective: there were reports of jurors sleeping throughout the trial. *Id.* at 1461. The schedule also exhausted counsel, who often worked until midnight preparing for the next day. *Ibid.* There is no parallel between those unusual facts and the facts of this case. In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

he sought a recess, petitioner's counsel did not suggest that he needed time to consult with petitioner. Thus, this case does not implicate any of the concerns underlying this Court's decisions in *Perry* v. *Leeke*, 109 S. Ct. 594 (1989), and *Geders* v. *United States*, 425 U.S. 80 (1976).[10] Neither *Geders* nor *Perry* suggests that a defendant has a constitutional right to require a trial court to recess a trial at a time of the defendant's choosing to enable him to speak with his attorney. See *United States* v. *Vasquez*, 732 F.2d 846, 847-848 (11th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

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[10] In *Geders*, this Court held that an order preventing the defendant from consulting with his attorney during a 17-hour overnight recess between the defendant's direct and cross-examination violated the defendant's Sixth Amendment right to the assistance of counsel. In *Perry*, the Court held that a defendant need not show prejudice to obtain a reversal of a conviction where he is impermissibly barred from consulting with his counsel during a break in trial proceedings, as in *Geders*.

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